XI-HC—78

43

उच्च न्यायालय, छत्तीसगढ़, बिलासपुर

मामला क्रमांक Cr.A. No. 119/2004 सन् 200

आदेश पत्रक (पूर्वानुबद्ध)

आदेश का दिनांक तथा आदेश क्रमांक	हस्ताक्षर सहित आदेश	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अंतिम आदेश

APPELLANTS/ ACCUSED (In Custody)

1. Sudas, aged 37 years, Son of Mulchand Kol, R/o village Bharrapara, P.S. Pendra, District Bilaspur (CG).

2. Samliya Bai alias Semliya Bai, aged 35 years, Daughter of Mulchand Kol, Resident of village Bharrapara, P.S. Pendra, District Bilaspur (CG).

-Versus-

RESPONDENT State of Chhattisgarh, through Police Station

(Criminal Appeal under Section 374(2) of the Cr.P.C.)

Division Bench :

Hon'ble Shri L.C. Bhadoo &
Hon'ble Shri Sunil Kumar Sinha, JJ

19-9-2007

Shri K.L. Pandey, counsel for the appellants.

Shri D.K. Gwalre, Addl. Public Prosecutor for the State.

Oral judgment dictated on *dais*.

L.C. Bhadoo, J

The accused/appellants have preferred this appeal against the judgment of conviction and order of sentence dated 1-11-2003 passed by the Additional Sessions Judge, Fast Track Court, Pendra Road, in Sessions Trial No.395/2000 whereby they have been held guilty under Section 302 read with Section 34 of the Indian Penal Code for committing murder of Mohan and have been sentenced to undergo imprisonment for life & to pay a fine of Rs.100/- each, in default of payment of fine to further undergo S.I. for three months.

उच्च न्यायालय, छत्तीसगढ़, बिलासपुर

मामला क्रमांक ..... सन् 200

आदेश पत्रक (पूर्वानुबद्ध)

आदेश का दिनांक तथा आदेश क्रमांक	हस्ताक्षर सहित आदेश —2—	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अंतिम आदेश

2) Case of the prosecution, in brief, is that on 27-8-2000 at about 7.30 p.m. Mohan (since deceased) was resting in the varandha of his house. At that time, accused Sudas & co-accused Samliya Bai (sister of accused Sudas) came in a drunken condition in the courtyard of house of Mohan and said that yesterday you have lodged a report in Police Station; therefore, they will not leave him alive. At the same time, accused Sudas poured kerosene on the body of Mohan, which was kept in a jerry-cane, whereas accused Samliya Bai set Mohan on fire with a stick of matchbox, as a result of which the clothes and the body of Mohan were burnt. He raised cries, on which PW-9 Shakuntala, daughter-in-law of the deceased & PW-12 Radha Bai, daughter of the deceased, saw that. The matter was reported by PW-7 Moolchand, son of the deceased, in Police Station Pendra Road, on which crime No.116/2000 for the commission of offence under Section 307 read with Section 34 of the Indian Penal Code was registered under Ex.P/7. Investigating Officer left for the scene of occurrence. Mohan was taken to Government Hospital, Pendra. Investigating Officer gave a written requisition for medical examination of Mohan to the Assistant Surgeon, Government Hospital, Pendra. On that, Dr. L.N. Patel (PW-1) examined the injuries & opined that it is a case of fire burn; smell of kerosene oil was present, mild to deep burn spreads 73%. It is a case of fire burn, duration within six hours. He prepared report under Ex.P/1. Investigating Officer immediately contacted the Executive Magistrate and requested him for recording the dying declaration of Mohan whereupon PW-13 Fakeer Ram Panda, Executive Magistrate, recorded the dying declaration of Mohan under Ex.P/6. Site plan (Ex.P/3) was prepared by Patwari. Vide Ex.P/8 the Investigating Officer seized the half burnt towel, from which kerosene smell was emanating, one half burnt baniyan of the deceased and the plastic

उच्च न्यायालय, छत्तीसगढ़, बिलासपुर

45

मामला क्रमांक ..... सन् 200

आदेश पत्रक (पूर्वानुबद्ध)

आदेश का दिनांक तथा आदेश क्रमांक	हस्ताक्षर सहित आदेश -3-	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अंतिम आदेश

jerry-cane just like bottle containing 50 gms. of kerosene oil. One blanket was seized under Ex.P/9. Site Plan (Ex.P/10) was prepared by the Investigating Officer. Mohan succumbed to the injuries during the treatment in Government hospital. On receiving merg intimation, the investigating Officer left for the hospital. After giving notice (Ex.P/14) to the Panchas, inquest (Ex.P/15) was prepared on the body of Mohan. Postmortem on the body of Mohan was conducted in Primary Health Centre, Pendra, by PW-4 Dr. Alok Saxena, who opined that as a result of syncope due septicemic shock caused by burn, which is ante mortem in nature. Postmortem report is Ex.P/5. Seized articles were sent for chemical examination to the Forensic Science Laboratory, Sagar, from where report (Ex.P/19) was received. It was reported that in the half burnt towel, baniyan & blanket, smell of kerosene was present whereas in the plastic container, kerosene was present.

3) After completion of investigation, charge sheet was filed in the Court of Judicial Magistrate First Class, Pendra Road, who in turn committed the case to the Court of Sessions Judge, Bilaspur, from where learned Additional Sessions Judge, Fast Track Court, Pendra Road, received the same on transfer for trial.

4) In order to establish the charge against the accused/appellants, the prosecution examined 14 witnesses. Statements of the accused persons were recorded under Section 313 of the Code of Criminal Procedure in which they denied the material appearing against them in the prosecution evidence. They stated that they are innocent and they have been implicated in a false case.

5) Learned Additional Sessions Judge after hearing counsel for the respective parties, convicted and sentenced the accused/appellants as aforementioned.

XI-HC—78

उच्च न्यायालय, छत्तीसगढ़, बिलासपुर

मामला क्रमांक ..... सन् 200

आदेश पत्रक (पूर्वानुबद्ध)

आदेश का दिनांक तथा आदेश क्रमांक	हस्ताक्षर सहित आदेश -4-	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अंतिम आदेश

6) We have heard Shri K.L. Pandey, learned counsel for the appellants and Shri D.K. Gwalre, Addl. Public Prosecutor for the State.

7) Shri Pandey, learned counsel for the accused/appellants, has not disputed the homicidal death of Mohan. Moreover, as per the evidence of PW-12 Radha Bai, daughter of the deceased, who has stated that at the time of incident she was cooking meal in the house and her father Mohan was sitting in the corridor. At that time, she heard the cries of her father. She rushed towards her father, who was saying to save him as Sudas & Samilya have set him on fire. She saw her father in burnt condition, but accused persons were not there.

8) PW-7 Moolchand, son of the deceased, has stated that on the fateful evening he was at his residence. He heard the cries of his father i.e. *save save*, therefore, he rushed towards the house of his father. He saw that accused Sudas & Samilya were running away from his father's house. He saw that his father was burning; therefore, he lodged the report.

9) PW-4 Dr. Alok Saxena, has stated that on 13-9-2000 he was working as Assistant Surgeon in the Primary Health Centre, Pendra. On that day, he conducted postmortem on the body of Mohan. Mohan was burnt up to 70%. Carbon particles were present in the lungs. Throat & wind pipe were burnt & carbon particles were present. Cause of death was infection on account of burn injuries, which were ante mortem in nature. Postmortem report is Ex.P/5. Therefore, in view of the above ocular & medical evidence, it is established that the death of Mohan was homicidal in nature.

10) As far as involvement of the accused persons in committing the murder of Mohan by setting him on fire is concerned, Shri Pandey, learned counsel for

उच्च न्यायालय, छत्तीसगढ़, बिलासपुर

मामला क्रमांक ..... सन् 200

आदेश पत्रक (पूर्वानुबद्ध)

आदेश का दिनांक तथा आदेश क्रमांक	हस्ताक्षर सहित आदेश -5-	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अंतिम आदेश

the accused/appellants, argued that the conviction is primarily based on the dying declaration (Ex.P/6) made by the deceased before the Executive Magistrate as also the evidence of PW-12 Radha Bai, daughter of the deceased, before whom Mohan said to have made oral dying declaration also. He also argued that there are material contradictions between the evidence of Radha Bai and the oral dying declaration. He submitted that in the dying declaration (Ex.P/6), it has been mentioned that the accused persons picked up glass bottle containing kerosene and poured the same on him whereas as per the seizure memo plastic jerry-cane was seized from the place of occurrence. He further submitted that the deceased in his dying declaration has stated that there was a quarrel between the accused persons and the deceased on the date of incident at about 6.00 p.m. whereas PW-12 Radha Bai in her evidence has stated that she is not aware of the earlier incident or quarrel between her father and the accused persons.

11) As per the settled law in order to base the conviction on the dying declaration, the dying declaration must inspire full confidence of the Court in its correctness & truthfulness that the deceased was in a fit state of mind to observe and identify the assailants. The Court before placing reliance must ensure that the dying declaration was not as a result of either tutoring, prompting or product of imagination.

12) The Constitution Bench of the Supreme Court In the matter of **Laxman vs. State of Maharashtra**[1] has held as under :

> "The situation in which a man is on the deathbed is very solemn and serene, is the reason in law to

[1] (2002) 6 SCC 710

उच्च न्यायालय, छत्तीसगढ़, बिलासपुर

मामला क्रमांक ..... सन् 200

आदेश पत्रक (पूर्वानुबद्ध)

आदेश का दिनांक तथा आदेश क्रमांक	हस्ताक्षर सहित आदेश —6—	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अंतिम आदेश

accept the veracity of his statement. It is for this reason that the requirements of oath and cross-examination are dispensed with. Since the accused has no power of cross-examination, the courts insist that the dying declaration should be of such a nature as to inspire full confidence of the court in its truthfulness and correctness. The court, however, has always to be on guard to see that the statement of the deceased was not as a result of either tutoring or prompting or a product of imagination. The court also must further decide that the deceased was in a fit state of mind and had the opportunity to observe and identify the assailant. Normally, therefore, the court in order to satisfy whether the deceased was in a fit mental condition to make the dying declaration looks up to the medical opinion. But where the eyewitnesses state that the deceased was in a fit and conscious state to make the declaration, the medical opinion will not prevail, nor can it be said that since there is no certification of the doctor as to the fitness of the mind of the declarant, the dying declaration is not acceptable. A dying declaration can be oral or in writing and any adequate method of communication whether by words or by signs or otherwise will suffice provided the indication is positive and definite. There is no requirement of law that a dying declaration must necessarily be made to a Magistrate and when such statement is recorded by a Magistrate there is no specified statutory form for such recording. Consequently, what evidential value or weight has to be attached to such statement necessarily depends on the facts and circumstances of each particular case. What is essentially required is that the person who records a dying declaration must be satisfied that the deceased was in a fit state of mind. Where it is proved by the testimony of the Magistrate that the declarant was fit to make the statement even without examination by the doctor the declaration can be acted upon provided the court ultimately holds the same to be voluntary and truthful. A certification by

उच्च न्यायालय, छत्तीसगढ़, बिलासपुर

(45)

मामला क्रमांक ..... सन् 200

आदेश पत्रक (पूर्वानुबद्ध)

आदेश का दिनांक तथा आदेश क्रमांक	हस्ताक्षर सहित आदेश -7-	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अंतिम आदेश

the doctor is essentially a rule of caution and therefore the voluntary and truthful nature of the declaration can be established otherwise.

It is indeed a hypertechnical view that the certification of the doctor was to the effect that the patient is conscious and there was no certification that the patient was in a fit state of mind especially when the Magistrate categorically stated in his evidence indicating the questions he had put to the patient and from the answers elicited was satisfied that the patient was in a fit state of mind whereafter he had recorded the dying declaration."

13) In the matter of **P.V. Radhakrishna vs. State of Karnataka**[2] the Supreme Court held that though a dying declaration is entitled to great weight, it is worthwhile to note that the accused has no power of cross examination. Such a power is essential for eliciting the truth as an obligation of oath could be. This is the reason the Court also insists that the dying declaration should be of such a nature as to inspire full confidence of the Court in its correctness. The Court has to be on guard that the statement of the deceased was not as a result of either tutoring, or prompting or a product of imagination. The Court must be further satisfied that the deceased was in a fit state of mind after a clear opportunity to observe and identify the assailant. Once the Court is satisfied that the declaration is true and voluntary, undoubtedly, it can base its conviction without any further corroboration. It is further held that it cannot be laid down as an absolute rule of law that the dying declaration cannot form the sole basis of conviction unless it is corroborated. The rule requiring corroboration is merely a rule of prudence.

(2003) 6 SCC 443

उच्च न्यायालय, छत्तीसगढ़, बिलासपुर

(59)

मामला क्रमांक ..... सन् 200

आदेश पत्रक (पूर्वानुबद्ध)

आदेश का दिनांक तथा आदेश क्रमांक	हस्ताक्षर सहित आदेश —8—	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अंतिम आदेश

14) In the light of above principles, if we examine the dying declaration (Ex.P/6) of deceased Mohan recorded on the next day of the incident by the Executive Magistrate Fakeer Ram Panda (PW-13) who has stated that on 28-8-2000 he was working as Tahsildar at Pendra Road. He has stated that Doctor gave certificate that the injured is in fit state of mind to give the statement. On query, he replied that Sudas & his sister Samliya came to his house and said that as he had reported the matter in Police Station regarding the beating given to his daughter Radha Bai by the accused persons. When he asked Sudas as to why they had beaten his daughter, Sudas said that he will set his house on fire, on which he asked the accused Sudas that he is elderly person and his eye-sight is weak, on which Sudas caught hold of deceased from his backside and his sister Samliya brought Kerosene, which was hanging on the wall of the deceased in a bottle, gave the same to her brother Sudas. Thereafter Samliya poured kerosene on the body of Mohan and Sudas set him on fire, as a result of which he sustained burn injuries. When he raised cries, his wife & son came. They extinguished the fire by pouring water on his body. Both the accused persons ran away. On query, Mohan also disclosed that there was a dispute between the accused persons and him in connection with field. At the time of recording of the dying declaration, Doctor was also present. After completion of the statement, Doctor gave certificate. The dying declaration bears his signature at 'A to A' portion. Dying declaration is Ex.P/6.

15) PW-1 Dr. L.N. Patel (PW-1) has stated that on 28-8-2000 at about 12.35 in the night the dying declaration was recorded and he gave the certificate (Ex.P/2) on the dying declaration itself, which bears his signature 'अ to अ' portion. The patient was conscious and he was in a position to give the statement.

उच्च न्यायालय, छत्तीसगढ़, बिलासपुर

(51)

मामला क्रमांक ..... सन् 200

आदेश पत्रक (पूर्वानुबद्ध)

आदेश का दिनांक तथा आदेश क्रमांक	हस्ताक्षर सहित आदेश —9—	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अंतिम आदेश

16) Perusal of the dying declaration (Ex.P/6) reveals that deceased Mohan has categorically stated that accused Sudas & Samliya had gave beating to his daughter at about 6.00 p.m. At that time, he was retuning from the pond and asked the accused persons as to why they have attacked his daughter. Thereafter accused Sudas threatened him that he will set his house on fire. Sudas asked co-accused Samliya to bring kerosene; Sudas caught the deceased from behind and poured kerosene on his body. Thereafter Sudas set him on fire, as a result of which his clothes & body burnt. Deceased has stated that the kerosene container (bottle) was hanging on the wall of his house, which was picked up by Samliya and she gave it to Sudas.

17) PW-7 Moolchand, son of the deceased, has stated that on the fateful day, he heard the cries of his father. Therefore, he rushed towards the house of his father. He saw that accused Sudas & Samliya were coming out of his father's house. Thereafter he saw that his father was burning, therefore, he extinguished the fire & reported the matter in Police Station. In cross-examination, he has stated that he is residing separately from his father. Shakuntala is his wife. It is incorrect to say that he saw Sudas & Samliya on the road, but he saw them when they coming out from his father's house.

18) PW-8 Phoolwati, wife of the deceased, has been declared hostile. On cross-examination, she has stated that at the time of incident her daughter Radha Bai was cooking meal and her husband was sitting in the corridor. Accused persons came abusing in their house, but she has stated that she had not seen the accused persons setting her husband on fire. It is correct to say that the accused persons ran away after setting her husband on fire.

उच्च न्यायालय, छत्तीसगढ़, बिलासपुर

52

मामला क्रमांक ..... सन् 200

आदेश पत्रक (पूर्वानुबद्ध)

आदेश का दिनांक तथा आदेश क्रमांक	हस्ताक्षर सहित आदेश —/0—	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अंतिम आदेश

19) PW-9 Shakuntala, wife of PW-7 Moolchand & daughter-in-law of the deceased, has also turned hostile, but she has stated that she went to the house of her father-in-law in the evening & saw him in burnt condition. At that time, her mother-in-law (Phoolwati) & sister-in-law (Radha Bai) were present. Her father-in-law was taken to the hospital. She reached in the house after 5 to 10 minutes when her father-in-law was already set on fire.

20) PW-12 Radha Bai, daughter of the deceased, has stated that on the fateful day, she was cooking meal at the residence and her mother was not present in the house. Her father was sitting in the corridor. At that time, she heard the cries of her father. He was saying that he be saved. Sudas & Samliya have set him on fire. She saw her father in burnt condition, but the accused persons were not present there. By that time her sister-in-law Shakuntala came. Clothes of her father were already burnt. Thereafter her father was taken to the hospital.

21) From the evidence of PW-7 Moolchand, the fact established that when he came to his father's house after hearing his cries, he saw that the accused persons Sudas & Samliya were running away from the house of his father. His father was in burnt condition. PW-12 Radha Bai has stated that when she came out after hearing the cries of her father, her father said that Sudas & Samliya have set him on fire. From the evidence of these witnesses, the presence of accused persons in the house of the deceased at the time of incident is established. Therefore, dying declaration of Mohan is corroborated to the extent about presence of the accused persons. Whereas deceased in his dying declaration has categorically stated that accused Sudas & Samliya set him on fire.

उच्च न्यायालय, छत्तीसगढ़, बिलासपुर

मामला क्रमांक ..... सन् 200

आदेश पत्रक (पूर्वानुबद्ध)

आदेश का दिनांक तथा आदेश क्रमांक	हस्ताक्षर सहित आदेश — 11 —	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अंतिम आदेश

22) In the cross-examination of the Executive Magistrate, the defence has not been able to elicit any circumstance, which shows that Mohan was not in a fit state of mind to give statement or that he was not able to identify the accused persons or that the dying declaration was the outcome of tutoring or product of imagination.

23) As far as the argument of learned counsel for the accused/appellants regarding contradiction to the effect that deceased Mohan in his dying declaration has stated that the accused persons after lifting the kerosene bottle, poured kerosene on his body whereas jerry-cane has been seized by the Investigating Officer from the place of occurrence is concerned, if the seizure memo (Ex.P/8) is put to close scrutiny, then there is no material contradiction regarding the container of kerosene. In dying declaration deceased has stated that there was a glass bottle in which the kerosene was there whereas in the seizure memo (Ex.P/8) it has been mentioned that bottle like plastic jerry-cane was seized. Perusal of the FSL Report (Ex.P/19) shows that the colour of the plastic container was white. Deceased has already stated that his eye-sight was weak. It is just possible that the white plastic container was resembling the glass bottle that is why he stated that kerosene was there in the glass bottle, therefore, there is no much contradiction, which may effect the whole prosecution case on this ground only and no importance can be attached to such minor infirmity.

24) PW-12 Radha Bai, daughter of the deceased, has also stated that at the time of incident she was cooking meal at her residence. Evening time her presence at residence is quite natural. She has categorically stated that when she came out from the room after hearing the cries of her father she saw him in

accused

उच्च न्यायालय, छत्तीसगढ़, बिलासपुर

54

मामला क्रमांक ..... सन् 200

आदेश पत्रक (पूर्वानुबद्ध)

देश का दिनांक । आदेश क्रमांक	हस्ताक्षर सहित आदेश -12-	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अंतिम आदेश

a burnt condition and her father said that Sudas & Samliya have set him on fire. Therefore, the dying declaration (Ex.P/6) finds corroboration from the evidence of PW-12 Radha Bai also regarding the involvement of the accused persons in the crime in question. Radha Bai has stated that even though Sudas & Samliya were not there, but her father categorically stated that Sudas & Samliya have set him on fire. Even in the cross-examination of this witness regarding her presence in the house at the time of incident, the defence has not been able to bring on record that her presence was doubtful.

25) In view of the foregoing reasons, the dying declaration (Ex.P/6) inspires full confidence of the Court in its correctness & truthfulness, as the same is corroborated by the evidence of PW-7 Moolchand, son of the deceased, as also the evidence of PW-12 Radha Bai, daughter of the deceased, regarding the involvement of the accused persons in setting the deceased on fire. Therefore, we do not find any illegality or infirmity in the judgment of the trial Court in convicting the accused persons for commission of offence under Section 302 read with Section 34 of the Indian Penal Code.

26) In the result, this appeal being devoid of merit liable to be dismissed and it is hereby dismissed.

Sd/-
L.C.BHADOO
Judge

Sd/-
Sunil Kumar Sinha
Judge

accused